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THE IMPUTATION OF INSANITY AS A CAUSE OF ACTION FOR DEFAMATION.

I.

According to Odgers on Libel and Slander, *53 (Bl. ed. 1887), spoken words are actionable: 1, Where the words charge the plaintiff with the commission of a crime; 2, When they impute to him a contagious or infectious disease, tending to exclude him from society; 3, When they are spoken of him in the way of his office, profession, or trade (or business, as others state the rule, that being a more comprehensive word than trade); 4, When, although not *per se* actionable, they have caused some special damage to the plaintiff. This classification, however, seems to be faulty, in that it apparently classes words affecting a man in his profession or business with those *per se* actionable on account of their defamatory character; whereas the former become actionable only by reason of the person in reference to whom they are spoken, and should therefore be classed with those words which are actionable only by reason of special damage, the fact that a person is in trade, as was said by WILLIAMS, J., in *Rolin v. Stewart* (1854), 14 C. B. 603, standing in the place of special damage. Newell on Defamation, Slander, and Libel (1890), extends (page 84) the list of words actionable *per se* to those which impute moral turpitude, or a want of chastity and the like. Townshend, in the fourth edition of his work on Slander and Libel (page 157, &c.,) adopts a more intricate classification, but one that in the main agrees with that of Newell.

Do words imputing insanity fall under any of these heads?

The causes of insanity are so numerous, that although it may be caused by criminal excesses, the presumption is that it is not so caused, and therefore the imputation of it does not imply any idea of criminality or turpitude on the part of the one to whom it is imputed, unless there be words added which would necessarily imply that such was the case. And while insanity is a disease, or at least has been so held for certain purposes (see *McCullough v. Expressman's Ass'n*, 1890, 133 Pa. 142 and cases cited), yet it is not a disease the imputation of which is considered *per se* defamatory. As HOAR, J., said in *Joannes v. Burt* (1863), 6 Allen (Mass.) 236 :

An action for oral slander, in charging the plaintiff with disease, has been confined to the imputation of such loathsome and infectious maladies as would make him an object of disgust and aversion, and banish him from human society. We believe the only examples which adjudged cases furnish are of the plague, leprosy and venereal disorders.

It is clear, then, that spoken words imputing insanity are not actionable *per se*, and that therefore they cannot be the basis of an action unless it clearly appear that they caused some special damage to the plaintiff, or that they were spoken of him in the way of his office, profession, or business, in which case they would doubtless be held actionable, if their natural tendency was to cause him pecuniary loss. But this tendency to cause loss cannot be a merely possible one. It must be either the necessary result of the words spoken, or their actual result, either natural or proximate: Townshend, *Slander and Libel*, page 224, n, citing *Foulger v. Newcomb* (1867), L. R. 2 Ex. 327. Is it the necessary or the natural tendency of an oral imputation of insanity to cause pecuniary loss to the plaintiff, even if spoken of him in the way of his profession or business? Words and phrases which impute insanity or mental disease are so loosely used in common conversation, and the habit of exaggeration is so prevalent, that but little attention is paid to them. Such expressions as "he is wild," "he is not

right," "he is cracked," "he is crazy," and the like, are frequently used even in reference to friends and relations; and they really mean no more than that the individual referred to does not agree with the speaker's ideas or prejudices, although their strict and literal signification is that the person mentioned is mentally diseased or affected. This loose use of language is so well known, that almost no one understands these expressions literally (unless, perhaps, when they are spoken by a physician, whose profession gives his words an additional weight in this case), so that they rarely injure anyone, even in his business. And if this is so, what injury can be reasonably apprehended from the use of such expressions? All imputations which may affect a man in his profession or business are not actionable. It has been held that it is not libellous to publish of a lawyer that he is a "crank": *Walker v. Tribune Co.* (1887), U. S. C. Ct. N. D. Ill., 29 Fed. Repr. 827, and it may be observed, that in common parlance the term "crank" has, as was urged by the plaintiff in the case just cited, a tolerably well-defined and somewhat opprobrious meaning, and one that is similar to that of the expressions previously mentioned.

The text books, as a rule, state in general terms that an imputation of insanity is actionable, without making any distinction between oral and written imputations; but cite, as authority, cases of the written imputation thereof. Townshend, however, states on page 200, under the head of the imputation of disease, that it is not actionable to charge one with being insane, unless it affects him in his business, and cites the case of *Joannes v. Burt*, *supra*. But the authorities hardly bear out even this qualification of the principle. In *Mayrant v. Richardson* (1818), 1 Nott and McCord (S. C.) 347, where the defendant had said of the plaintiff, who was a candidate for election to Congress, "He (meaning William Mayrant) is impaired in his understanding; his mind is impaired; his mind is injured by disease; that Doctor Irvine told him so; that Doctor Irvine said his mind was impaired, weakened, and could never be depended on," it was held, in spite of plaintiff's claim that this slander

caused him to lose the election, that the words were not actionable, the Court, per NOTT, J., saying :

The words in this case * * barely express an opinion that the plaintiff's mind had been impaired by disease. That was a misfortune and not a fault. It might have been calculated to excite compassion, but not hatred, ridicule or contempt. * * It is not pretended that these words, spoken of a private individual, would have been actionable. And I am not aware of any principle of Law or Constitution, by which a person by proclaiming himself a candidate for Congress, becomes so far elevated above the common level of mankind, as to entitle him to any exclusive privileges. * * The defendant might not have been able to prove, that the plaintiff's mind had been impaired by disease, or that he was not qualified to fill the important station for which he offered his services, yet it might have been his opinion. He might have been actuated by the utmost malice, but it may have been his opinion still. It is a question not susceptible of proof. The Constitution has fixed no *grade of mind* which is necessary to qualify a person for a seat in Congress ; neither have we any *intellectual scale* by which to measure the understanding. It is a question on which a man may differ in opinion from all the rest of the world ; on which he has a right to differ from them all and to express his opinion. * * Even when special damage is the foundation of the action, the words must be of an opprobrious nature, and such as are calculated to lessen the person of whom they are spoken, in the opinion of the community. But where they are perfectly justifiable or innocent, no action will lie, although some injury may have resulted from them. As to say of a *Lawyer*, that he was not *witty*, by which he lost a fee ; of a *Clergyman*, that he was not eloquent, by which he failed to get a place, or of a *Woman*, that she was not handsome, by which she lost her marriage ; all these are mere matters of opinion, which furnish no standard by which the truth can be determined, and of which every person has a right to judge for himself ; and such I have shown the words in the principal case to be. The private character has not been attacked, the moral conduct impeached, nor the sanctuary of domestic tranquillity violated. There has been no imputation calculated to render the plaintiff an object of contempt or ridicule, or to lessen him in the estimation of his fellow-citizens.

In *Joannes v. Burt*, *supra*, it was held by Judge HOAR that an oral imputation of insanity was not actionable without an averment of special damage. So, also, in *Weldon v. De Bathe* (1885), 33 W. R. 328, where it was alleged that the defendant falsely and maliciously spoke and published of the plaintiff, a married woman, certain words to the effect that he had seen the plaintiff, and that from what he had seen and heard he thought it his duty to urge the plaintiff's

husband to send for one or two doctors to see her, and that some opinion should be taken as to the state of her mind, a similar rule was laid down by BRETT, M. R., in these words:

As to the slander, it seems to me to be perfectly clear that the plaintiff cannot maintain the action, even if the words were spoken as alleged. The law is perfectly plain and has long been settled that, in respect of slanderous words such as these in question, however distasteful they may be to a plaintiff, an action will not lie unless they have produced that which the law recognizes as special damage. To constitute such damage it is necessary to prove something more than injury to the plaintiff's feelings, because that is not a legal cause; though, by way of damage, where there is a cause of action, the law does take notice of such injury. Therefore slander causing mere injury to feelings is no cause of action. Another rule is that the special damage must be the natural and reasonable result of the words spoken.

In *Wildee v. McKee* (1885), 111 Pa. 335, an action on the case for conspiracy to defame, the plaintiff alleged that he was engaged in the business of a teacher; that the defendants formed a conspiracy to defame him, and that the said defendants "falsely and maliciously spoke and published of and concerning the said plaintiff, and of and concerning him in his said business and profession, * * the false, scandalous, malicious, and defamatory words following, that is to say, 'The man (meaning the said plaintiff) must not be right in his mind, thereby meaning that the said plaintiff was incapacitated for his said business and profession on account of insanity and monomania on the subject of adultery and whoredom.'" To this statement the defendants demurred, and the Court below sustained the demurrer. This ruling was reversed, however, in the Supreme Court, in an opinion by STERRETT, J., which, after reciting the allegations of the plaintiff, proceeds as follows:

Coupled, as this count [the one partly recited above] is, with the recitals and averments by which it is preceded, and followed by an averment of special damages, we cannot, in view of the authorities above referred to, say the charge therein contained is not actionable. We have no right to indulge in any speculation as to the answer the defendants may make to the charges contained in the declaration. They elected by their demurrer to take the position that the recitals and charges contained in the declaration, assuming them to be true, are insufficient to warrant

a verdict and judgment in favor of plaintiff. In this they were sustained, erroneously as we think, by the court below.

It is clear from this that the sufficiency of the declaration did not rest upon the defamatory character of the imputation of insanity alleged.

From these authorities, which are all that the books contain on this branch of the subject, it follows, as was previously contended on general principles, that an oral imputation of insanity is not so opprobrious and injurious to reputation, or an imputation of such a disease, as is *per se* defamatory in the eye of the law; that on the contrary, it tends to awaken a generous sympathy for the sufferer in the hearts of his fellow men; that it is a mere matter of individual opinion, on which every person has a right to express himself in good faith, and that, therefore, it is not actionable, unless special damage can be averred and proved. This special damage, moreover, must be actual pecuniary loss, and be the natural result of the imputation; or be inferred from the fact that the plaintiff is engaged in a profession or business where injury would naturally and necessarily result to him from such an imputation. *Mayrant v. Richardson* (*supra*, page 391,) would seem to hold that such an imputation can never be actionable, without the proof or necessary inference of actual malice; but that would scarcely be maintainable to-day.

The true rule, stated briefly, is as follows: An oral imputation of insanity is not actionable, unless it be the cause of special damage, or directly affect the plaintiff in his profession, office, or business.

II.

Is the imputation of insanity libelous, when written or printed? This is a more doubtful question. Many imputations are actionable when written, which are not so when spoken, and it is very difficult to lay down any general rule in regard to these cases. Most of them, doubtless, proceed upon the assumption that written imputations are supposed to be made after due reflection, and therefore carry more

weight to the mind of the reader than spoken imputations to the hearer; receive more attention and consideration, and are more likely to injure the person to whom they refer. But if, as has been shown to be the rule in oral imputations of insanity, the spoken imputation is not *per se* opprobrious, defamatory or injurious, can the mere fact of writing or printing it make it so? The text books hold, with great unanimity, that it does; in other words, that the written imputation of insanity is *per se* libellous: Odgers, Libel and Slander, page *21 (Bl. ed. 1887); Townshend, Slander and Libel, pages 209 and 241 (4th ed. 1890). The cases, however, hardly bear out this bald statement, as a critical examination will show. In none of them has the mere imputation of insanity been before the court, but there have been additional circumstances which no doubt had a large influence in molding the decision.

In the earliest English case, that of *Rex v. Harvey* (1823), 2 B. & C. 257, the defendants had published a newspaper article headed "Latest Intelligence—The King," and beginning: "Attached as we sincerely and lawfully are to every interest connected with the sovereign, or any of his illustrious relatives, it is with the deepest concern we have to state, that the malady under which his majesty labours is of an alarming description. It is from authority we speak." It concluded by alleging that his disorder was of an hereditary description. No question as to the libellous nature of the imputation was raised, it being conceded, as appears from the opinion of BAYLEY, J., "that to state falsely of his majesty that which is stated in this publication is a libel." But the case is *sui generis*, and of but little authority, for not only does "the divinity that doth hedge a king" afford ample reason for holding the publication libellous, but it also totally fails, in other cases, to extend its ægis over private individuals, and there is no good reason why it should in this instance.

The case of *Morgan v. Lingen* (1863), 8 L. T. N. S. 800, before Baron MARTIN, at *nisi prius*, upon which the rule laid down in the text books appears to be based, was founded

upon an imputation of insanity, cast upon a private individual. There were two counts, one for oral, the other for written, defamation. It was proved that the defendant had sent a letter to a connection of the plaintiff, stating that he had no doubt that the plaintiff's mind was affected, and that seriously, and that he had known that she believed more than half a dozen people to be hostile to her, and that she had the delusion that, in several instances, his wife had stood in her way. It was also proved that he had made practically the same statements orally. The plaintiff was a governess. In charging the jury, Baron MARTIN said that in respect to the oral slander, he did not think special damage sufficiently proved—a *dictum* which corresponds with what has previously been stated to be the rule. In reference to the written imputation, he said :

A statement in writing that a lady's mind is affected, and that seriously, is, without explanation, *prima facie* a libel.

It is worth noting that the rule is not here laid down in the bald language of the text books, but with a qualification. What do these words "without explanation" mean in this connection? They cannot mean that the letter might be shown to be a privileged communication, for that phase of the case is discussed separately. They must mean an explanation of the causes and circumstances which led to the writing of the letter—presumably the proof of reasonable and probable cause to believe the plaintiff insane; or an opinion, not merely baseless, but with some foundation of fact, that the mind of the plaintiff was affected; such an opinion, in short, as was referred to in the passage quoted from *Mayrant v. Richardson* (*supra*, page 392).

The defendant might not have been able to prove, that the plaintiff's mind had been impaired by disease, * * * yet it might have been his opinion.

Not only, then, does this case fail to support the broad statement, for which it is cited as authority, that a written imputation of insanity is libellous, but the additional ele-

ment is present, that the plaintiff was a governess, and that the imputation was calculated to affect her in her profession. And it may be worth while to note that the jury found for the defendant.

In *Weldon v. Winslow*, *London Times*, March 14-19, 1884, the plaintiff, a married woman, brought suit against the defendant, a physician, and at the time the keeper of a private lunatic asylum, for damages for libel, assault and false imprisonment. The libel alleged was that the defendant had written to the plaintiff's husband:

I have been to Tavistock House this morning, and have seen Mrs. Weldon. I think it my duty to inform you it is imperative that immediate steps to secure her, should be taken.

It may be proper to mention, however, that, in the letter read on the trial, these words do not occur, the apparently libellous part of the letter being:

Her manner, general conversation and demeanor were those of an insane person, and I am decidedly of opinion that her condition is such as to require the immediate protection of her friends.

This charge of libel also rested upon the fact that Dr. Winslow had written to the editor of the *British Medical Journal* as follows:

I maintain, therefore, that I have convinced your readers that the proper course was advised in the case of Mrs. Weldon, and that, with the description of the interview, I was perfectly justified in my action. I also emphatically add, that all who have had any experience in mental disorders would have advised a similar course.

In pursuance of the aforesaid letter to her husband, an order was obtained under the Lunacy Acts, signed by Sir Henry De Bathe (against whom also an action was brought by Mrs. Weldon, which failed. See *Weldon v. De Bathe*, *supra*, page 392), and as to the regularity of which there seems to have been no question. It was intended to take Mrs. Weldon to the defendant's private asylum under the order, and the assault complained of was committed by the defendant's servants in pursuance thereof. She really was

not taken from her house at all, but, as she said, had been put under duress in it for some hours before escaping from it. On the part of the defendant, it was proved that the article in the *British Medical Journal* was in answer to another that had appeared in it a week before, in which Dr. Winslow had been distinctly challenged to justify his action. The case was tried at *nisi prius* before Baron HUDDLESTON, who held both publications privileged, saying that he had had grave doubts at first as to the character of the second; but as Mrs. Weldon had, previous to its publication, published several articles in various periodicals giving her views of the matter, he now considered it privileged, as well as the first. He held, also, that there was no case to go to the jury, saying:

Mr. Weldon had no doubt felt himself honestly bound to have an opinion taken as to her mental condition, and the medical men whom he had employed had come to an honest conclusion, but, as he [the judge] thought, a mistaken one, that she had not then been in full possession of her senses. With every inclination not to take a technical view of the case, he was bound to hold that there was no case to go to the jury. The libels complained of had been both written on occasions which were privileged, and he ought to take it upon himself to say that there was no reasonable evidence of malice on the part of the defendant. None of the statements made by him had been untrue, or untrue, at any rate, to his knowledge.

The gist of this decision manifestly is that while such an imputation, made under such circumstances by a physician, is *prima facie* libellous (which may be tacitly assumed, though not expressly stated), presumably because of the professional character of such a defendant, and the serious consequences which naturally result from such an opinion, especially in a case of this kind; yet if made *bona fide*, in a proper way, and to an interested person, or in other words, strictly as a professional opinion when properly called for, it will be privileged, as it then falls clearly within the definition of a privileged communication: Odgers, *204, &c; Townshend, 300, 301. Odgers cites this case as authority for the statement that "it is libellous for the manager of a private lunatic asylum to write of a lady, 'I have been to her

house this morning and seen her. I think it my duty to inform you it is imperative that immediate steps to secure her should be taken'" (page *21); but this is nowhere expressly stated in the report of the case, and this communication was the one as to the privileged character of which the judge had no doubts. The statement may be true on general principles, owing to the peculiar professional character of the manager of a lunatic asylum, the influence such an imputation coming from him would naturally have, and the consequences that might naturally be expected to follow; but this case is no direct authority for it.

The question of the libellous character of an imputation of insanity came before the Court collaterally in *Cave v. Torre* (1886), 54 L. T. N. S. 515, an action for damages for false imprisonment and libel. The libel complained of was a statement made by the defendant that the plaintiff was of unsound mind. This statement was contained in an order, signed by the defendant, for the removal of the plaintiff to a lunatic asylum; and the false imprisonment alleged related to the same matter. Although not the point directly in question, the matter of libel was touched in the opinion of Lord ESHER, M. R., who said:

The plaintiff complains that the defendant published a libel which consisted in saying that the plaintiff was a lunatic. Whether a jury in the end will say that, even if it is true, it is a libel or not, I cannot express any opinion. Whether it is a libel to say that a person is a lunatic I will not undertake to say. That is for a jury.

This at least shows that he was not prepared to hold, as Baron MARTIN had done in *Morgan v. Lingen* (*supra*, page 395), that such an imputation was *prima facie* libellous; and his real views may perhaps be inferred from this later passage of his opinion, "his own foolish addition about the thing being a libel, which is utterly ridiculous." It may be assumed, also, upon the authority of *Weldon v. Winslow* (*supra*, page 397), that if the question had been raised, the statement complained of would have been held privileged.

So much for the English cases. The earliest American case upon this point, even antedating *Rex v. Harvey*, is

Southwick v. Stevens (1813), 10 Johns. (N. Y.) 443. Both parties to the action were newspaper men ; and a war of words, which, unhappily for the defendant, seems to have been begun in his paper, was carried on between them for some time, until it culminated in the following article, which was the libel complained of :

It is with unfeigned grief we inform our readers, that *Southwick*, the late editor of the Albany *Register*, has become insane ; the progress of his malady has been observed for some time past ; and, at length, much to the regret of his friends, and his adversaries, it has resulted in a confirmed lunacy. The friends of the unfortunate, we understand, have confined him to his former editorial closet, and have consigned the management of his paper to a needy *Irishman* who wears straw in his shoes. Although this deplorable event has been expected by many for some time, yet decisive evidence of the disease having arrived at its last stage did not exist until the twenty-fourth instant, when the Albany *Register* exhibited such unequivocal proofs of the insanity of its editor, that the friends and creditors of the establishment, we are told, shut up the poor maniac, put him in a straight jacket, shaved his head, and confined him to bread and water.

It needs no argument to show that this publication is libelous ; but then it is a good deal more than a bare imputation of insanity. Its whole purpose and tendency was, as the Judge below charged, to hold up the plaintiff in a ridiculous point of light, and in that view it was libelous. It was written, however, in answer to an article published in the Albany *Register* of the twenty-fourth of the same month, which was calculated to cause great provocation ; and the Judge intimated that if the tone of this article had been less censorious and ridiculing, or if, as was not the case, the article in the Albany *Register* had been the first aggressive movement, he might have held this article privileged. This would have accorded with the decision in *Weldon v. Winslow* (*supra*, page 397), and with the rule laid down by Odgers, *232, and Townshend, 393, n.

In *Mayrant v. Richardson* (*supra*, page 391), there was, beside the count for oral slander, a second count for libel contained in a letter ; but the Court treats both together, and the language of the opinion must be taken as applying to either count indifferently. In this connection, however, it

may be noted, that in that case the idea of privilege was manifestly present in the mind of the Judge, as will appear from this passage of the opinion:

When one becomes a candidate for public honors, he makes *proferit* of himself for public investigation. All his pretensions become proper subjects of enquiry and discussion. He makes himself a species of *public property*, into the qualities of which every one has a right to enquire, and of the fitness of which, every one has a right to judge and give his opinions. The ordeal of public scrutiny, is, many times, a disagreeable and painful operation. But it is the result of that *freedom of speech*, which is the necessary attribute of every free government, and is expressly guaranteed to the people of this country by the Constitution": 1 Nott and McCord (S. C.) 350.

In *Perkins v. Mitchell* (1860), 31 Barb. (N. Y.) 461, the defendant was a physician; and the alleged libel was as follows:

CITY OF BROOKLYN, }
COUNTY OF KINGS. } ss.

We, Chauncey L. Mitchell, M. D., and William H. Dudley, M. D., of the City of Brooklyn, in said County, physicians, duly licensed to practice as such, according to the laws of the State of New York, do certify that we have examined into and are acquainted with the state of health and mental condition of Joseph Perkins of the City of Brooklyn, in said County, and that he is, in our opinion, insane, and a fit person to be sent to the lunatic asylum.

Dated Dec. 4, 1858.

(Signed)

CHAUNCEY L. MITCHELL, M. D.

WILLIAM H. DUDLEY, M. D.

COUNTY OF KINGS, ss.

Chauncey L. Mitchell, of the City of Brooklyn, in said County, being duly sworn, says, that he is acquainted with Joseph Perkins, of said City, and that he is disordered in his senses, and has been so for some time past; and that he is, in this deponent's best judgment and belief, so disordered in his senses as to endanger the persons of other people, if left unrestrained, and that it is dangerous to permit him longer to go at large.

(Signed)

CHAUNCEY L. MITCHELL, M. D.

Sworn before me this 4th day of December, 1858.

F. Q. DALTON,

A. G. HAMMOND,

Justices of the Peace, Kings County.

It was alleged that, in consequence of this affidavit, the plaintiff was taken to a lunatic asylum, and detained there

for four days. The defendant demurred, a perilous proceeding in such a case, and the demurrer was overruled. This action of the lower Court was sustained in the Supreme Court in a lengthy opinion by Judge EMOTT, in the course of which he said :

It is clearly libelous to publish of another that he is "insane and a fit person to be sent to the lunatic asylum;" or that "he is so disordered in his senses as to endanger the persons of other people, if left unrestrained, and that it is dangerous to permit him longer to go at large." There is no definition of libel which has ever been received by the courts which will not include such a charge. It is a censorious and ridiculing writing, and if untrue, it will ordinarily be inferred to have been made with a mischievous and malicious intent towards the individual named ; which are the conditions of General Hamilton's celebrated definition in the *Croswell Case* (1804, 3 Johns. Cas. 337, 354 ; 1812, 9 Johns. 215). It sets the plaintiff in an odious light, and exposes him to public contempt and aversion, which is Blackstone's rule (3 Comm. 125 ; 4 Id. 150).

This is undoubtedly true of the publication in this case. No doubt can exist but that an imputation that a man is a dangerous lunatic, holds him up in an odious light, and is calculated to seriously injure his business and reputation ; for most people are inclined to give a dangerous lunatic a wide berth. But such an imputation is clearly very different from a mere imputation of insanity in general, without any such addition. The language of the Court, then, cannot be properly applied to such a case. And, besides, special damage was present in the shape of false imprisonment, and the person who made the imputation was a physician. The Court fully recognized the principle previously contended for, that such an imputation is more serious when coming from a physician, in the following passage :

Nor is the libelous character of the language destroyed, or diminished, by the fact that the defendant is a physician, and makes the statement as a professional opinion. It is rather an aggravation of such a charge that it is backed by the professional skill and authority of a medical man. Can it be doubted that if a physician should, without cause or justification, wantonly write and publish a statement that a man was insane, dangerous and unfit to be at large, and that such was his opinion as a medical man, he would be liable to an action for libel ?

In regard to the question of privilege, which came up in two aspects, one general, the other based upon the fact that the affidavits complained of as libelous were made in the course of a regular judicial proceeding under the New York Lunacy Acts, the general rule, conformably to that laid down in the text books, was stated to be, that "to give to a statement made by a physician, which would otherwise be criminary and libelous, a privileged character, he must not only utter it as a medical man, but it must be made in the discharge of a duty, and to a person who has or is engaged in a corresponding duty in reference to the subject matter."

Upon the second aspect of the question the Court held as follows:

It is not, in my judgment, libelous or actionable as such, for a physician to furnish evidence, either voluntary or under a subpoena, that another is insane, in a proceeding duly taken under any of the clauses of this statute. * * * No action of libel can be maintained for an assertion of the insanity of the plaintiff, contained in an affidavit made in a proceeding properly and legally instituted under this statute.

This, it will be observed, is in full accord with the ruling in *Weldon v. Winslow* (*supra*, page 397). In the present case, however, the complaint, which, as the Judge observed, "must state all the facts which the defendant would be obliged to plead in setting up his privilege, in order to show that the plaintiff has no cause of action in the publication of a charge which in itself is clearly libelous," failed, in the opinion of the Court, and as a skilful pleader would certainly make it fail, to set forth the facts which would make it privileged, and the order overruling the demurrer was sustained. But had it been the case that the facts were fully before the Court, there can be no doubt that the alleged libel, as in *Weldon v. Winslow*, would have been held privileged.

In *Clifford v. Cochrane* (1882) 10 Ill. App. 570, the plaintiff had received an appointment as architect of the San Francisco City Hall, and, it seems, had referred to the defendant for testimony as to his qualifications. The alleged

libel was contained in an interview with the defendant, published in the *Chicago Times* and copied in one of the San Francisco papers, in which the defendant was represented as saying, *inter alia*, and repeating the same, or closely similar statements, even after he had been informed of the reference to him by the plaintiff, "I think he is crazy. Had it happened [*i. e.*, Clifford's appointment] I should regard it in the light of a public calamity," and "I again say that I cannot regard it in any other light than a public calamity." The plaintiff alleged that in consequence of the republication of the article in the San Francisco *Chronicle*, his bondsmen withdrew as sureties on his bond, and being unable to procure others, he was forced to, and did, resign his position as architect of the building in question. The Court laid down the general rule as to words affecting one in a particular calling, as follows:

Any words spoken of such a person in his office, trade, profession, or business, which tend to impair his credit, or charge him with fraud, or indirect dealings, or with *incapacity*, and that tend to injure him in his trade, profession, or business, are actionable, without proof of special damage.

In regard to the words in the present case it was held :

To say of the plaintiff, "The poor fellow is crazy," and that his appointment could be regarded in no other light than a public calamity, with other similar statements made and repeated after the defendant had been notified that the plaintiff had referred to him as to his qualifications as an architect, was, if the words were untrue, a grievous slander, which would naturally and almost necessarily tend to the plaintiff's injury. It was tantamount to a direct and positive assertion that the plaintiff was destitute of the necessary qualifications for the proper discharge of the duties of an architect.

In this case, it will be seen, there were several additional circumstances to aggravate the general imputation of insanity. The libel complained of was plainly of the plaintiff in his profession ; words were used, which, far more clearly than the imputation of insanity, conveyed the idea that he was unfit to perform the duties of the position to which he had been chosen ; and these charges were aggravated by the

fact that they were reasserted after the defendant had been notified that the plaintiff had referred to him as to his qualifications, a fact which would naturally tend to prove malice on the part of any defendant, if his assertions be untrue.

In *Moore v. Francis* (1888), 3 N. Y. Supp. 162, reversed in the Court of Appeals (1890), 121 N. Y. 199, the question as to the libelous character of such an imputation underwent a thorough discussion. The libel complained of was an article published in the *Troy Times* of September 15, 1882, written on the occasion of rumors of trouble in the financial condition of the Manufacturers' National Bank of Troy, of which the plaintiff was, at the time of the publication, and for several years prior thereto, had been, teller. These rumors had caused a run upon the bank, and the chief motive of the article was to allay public excitement on the subject. The part of the article alleged to be libelous was as follows:

Several weeks ago it was rumored that Amasa Moore, the teller of the bank, had tendered his resignation. Rumors at once began to circulate. A reporter inquired of Cashier Wellington if it was true that the teller had resigned, and received in reply the answer that Mr. Moore was on his vacation. More than this the cashier would not say. A rumor was circulated that Mr. Moore was suffering from overwork, and that his mental condition was not entirely good. Next came reports that Cashier Wellington was financially involved, and that the bank was in trouble. A *Times* reporter at once sought an interview with President Weed of the bank, and found him and Directors Morrison, Cowee, Bardwell and others in consultation. They said that the bank was entirely sound, with a clear surplus of \$100,000; that there had been a little trouble in its affairs, occasioned by the mental derangement of Teller Moore, and that the latter's statements, when he was probably not responsible for what he said, had caused some bad rumors.

On the trial of the case, the Judge refused to charge the jury that this article was *per se* libelous; but left the question to their decision, under instructions. The jury found for the defendants, and the plaintiff moved for a new trial. This was refused, and he then appealed to the Supreme Court, which sustained the rulings of the Court below in a somewhat elaborate and lengthy opinion, which closely follows the line of reasoning adopted in *Mayrant v. Richard-*

son (*supra*, page 391), as the following extracts from the opinion of LEARNED, P. J., will show :

It is possible that, in modern times, when the subject of mental derangement has been more thoroughly studied and understood, language imputing it may have a different effect on the minds of those who hear it from what it once had. It would be thought perhaps to be only a statement that the body was disordered, and that such disorder manifested itself in mental condition ; and to say that a man is in poor health cannot be libelous as a matter of law. * * In the present article, it is stated that the plaintiff was suffering from overwork. There is nothing disgraceful in that. The connection shows that such overwork was the alleged cause that his mental condition was not good. Certainly this would not cause public hatred, contempt, or ridicule. It would cause sympathy and regret. It could not blacken the plaintiff's reputation. No offensive words are used. The mental condition of men is generally not good when they are suffering from overwork. * * It seems to us, then, that it would have been incorrect to charge that this article was *per se* libelous as a matter of law.

Upon the question whether the imputation so affected the plaintiff in his profession as to make it actionable, the Court held :

In the present case, the words do not refer to the plaintiff's skill, or want of skill as a teller. They have no special reference to his occupation. If the plaintiff had been a mechanic, and had lost his bodily strength, that would not have had any special reference to his trade. The Court, however, charged that if the tendency of the article was to injure the plaintiff in his profession, it was libelous, thus leaving that question, as the Court had left the other question, to the jury. It seems to us, then, that it was not error for the Court to refuse to charge that the publication was libelous.

In this case, in the Court of Appeals (1890), 121 N. Y. 199, ANDREWS, J., who delivered the opinion of the Court, discusses at some length the question as to the libelous character of an imputation of insanity, but without arriving at any very definite result, except that "the imputation of insanity in a written or printed publication is *a fortiori* libelous where it would constitute slander if the words were spoken," and "several of the text writers state that to charge in writing that a man is insane, is libelous ;" but he clearly shows his own unwillingness to decide the case upon this basis, and takes the far safer and perfectly accurate ground that the article affected the plaintiff in his calling :

The publication now in question is not simply an assertion that the plaintiff is or has been affected with "mental derangement," disconnected with any special circumstances. The assertion was made to account for the trouble to which the bank had been subjected by reason of injurious statements made by the plaintiff while in its employment. Words, to be actionable on the ground that they affect a man in his trade or occupation, must, as is said, touch him in such trade or occupation; that is, they must be shown, directly or by inference, to have been spoken of him in relation thereto, and to be such as would tend to prejudice him therein. (*Sanderson v. Caldwell*, 1871, 45 N. Y. 405, and cases cited.) The publication did, we think, touch the plaintiff with respect to his occupation as bank teller. It imputed mental derangement while engaged in his business as teller, which affected him in the discharge of his duties. The words conveyed no imputation upon the plaintiff's honesty, fidelity, or general capacity. They attributed to him a misfortune brought upon him by an overzealous application in his employment. While the statement was calculated to excite sympathy, and even respect, for the plaintiff, it nevertheless was calculated, also, to injure him in his character and employment as a teller. On common understanding, mental derangement has usually a much more serious significance than mere physical disease. There can be no doubt that the imputation of insanity against a man employed in a position of trust and confidence, such as that of a bank teller, whether the insanity is temporary or not, although accompanied by the explanation that it was induced by overwork, is calculated to injure and prejudice him in that employment, and especially where the statement is added that, in consequence of his conduct in that condition, the bank has been involved in trouble. The directors of a bank would naturally hesitate to employ a person as teller whose mind had once given way under stress of similar duties, and run the risk of a recurrence of the malady. The publication was, we think, defamatory, in a legal sense, although it imputed no crime, and subjected the plaintiff to no disgrace, reproach, or obloquy, for the reason that its tendency was to subject the plaintiff to temporal loss, and deprive him of those advantages and opportunities as a member of the community which are open to those who have both a sound mind and a sound body.

This case, then, does not hold that a mere imputation of insanity is libelous *per se*, but that it is libelous when it affects the person referred to in his profession or business.

These cases, then, are all dependent, in part at least, upon special circumstances. In *Rex v. Harvey*, the imputation was against the King; in *Southwick v. Stevens*, the whole article, in which the imputation was contained, was clearly libelous; in *Perkins v. Mitchell*, the imputation was that the plaintiff was a dangerous lunatic; it was made by a physician, and the question was raised by demurrer, which

failed to bring the privilege distinctly before the court; in *Morgan v. Lingen*, the rule is asserted in a qualified form; in *Clifford v. Cochrane*, and *Moore v. Francis*, the imputation was of the plaintiff in his profession or business; and in *Mayrant v. Richardson* and *Weldon v. Winslow*, the imputation was held not actionable, in the first case because it was not considered defamatory, and in the second because, although made by a physician, it was made under circumstances which gave it a privileged character.

III.

The question of the libelous character of a mere imputation of insanity is therefore still open. It has already been seen that, as the Court concedes in *Moore v. Francis* (1890), 121 N. Y. 199, an oral imputation of insanity is not actionable without special damage. It, then, such an imputation is not defamatory when made orally, why should it be held to be so when written or printed? The imputations which have been held libelous when written, although not actionable when spoken, are, almost without exception, such as have a more or less defamatory or opprobrious meaning, such as "liar," "rogue," "rascal," "villain": *Townshend, Slander and Libel*, §§ 174 and 177. Such words fall directly within the definitions given of a libel, *e. g.*:

A publication, to be a libel, must tend to injure the plaintiff's reputation, and expose him to public hatred, contempt and ridicule: *Armstrong v. Moranda* (1847), 8 Blackf. 426.

A publication is a libel which tends to injure one's reputation in the common estimation of mankind, to throw contumely or reflect shame and disgrace upon him, or hold him up as an object of hatred, scorn, ridicule, and contempt, although it imputes no crime liable to be punished with infamy, or to prejudice him in his employment. So every publication by writing, printing, or painting, which charges or imputes to any person that which renders him liable to punishment, or which is calculated to make him infamous or ridiculous, is *prima facie* a libel: 1 Hilliard on Torts, 3d ed. (1886), ch. 7, § 13.

The mere imputation of insanity does not meet the conditions of these definitions. It neither injures the reputation, nor exposes to hatred, contempt, or ridicule. As was said in *Mayrant v. Richardson*: "It might have been calcu-

lated to excite compassion, but not hatred, ridicule, or contempt," and "the private character has not been attacked, the moral conduct impeached, nor the sanctuary of domestic tranquillity violated. There has been no imputation calculated to render the plaintiff an object of contempt or ridicule, or to lessen him in the estimation of his fellow citizens." So in *Moore v. Francis* (1888), 3 N. Y. Supp. 162, which, although reversed in the Court of Appeals, is not there weakened on this point: "Certainly this would not cause public hatred, contempt, or ridicule. It would cause sympathy, and regret. It could not blacken the plaintiff's reputation." That the imputation of insanity, not qualified by special circumstances, causes a feeling of compassion, and not contempt, for the sufferer, is beyond question. The remark of BRETT, M. R., in *Weldon v. De Bathe*, that "It is not a true proposition that the natural result of words imputing insanity in a wife is to produce ill feeling towards her by her husband," will apply equally well to all relations of life and society. This is sufficiently well proved by common experience, by the notices of those so afflicted which are published in the newspapers, for example. Such notices rarely breathe anything but sympathy. It is, of course, easy to add to the mere imputation words which will lend it a censorious or defamatory color, as in *Southwick v. Stevens* and *Perkins v. Mitchell*; but such cases stand on their own peculiar state of facts.

This consequence is only natural, in view of the fact that insanity, as previously stated, is a disease: *Mayrant v. Richardson*, *Joannes v. Burt*, *McCullough v. Expressman's Ass'n*, *supra*; *Lancaster Co. National Bank v. Moore* (1875), 78 Pa. 407. But it is not a disease the imputation of which is *per se* libelous: *Joannes v. Burt*, *supra*. On the contrary, it is held to be *actus Dei*: *Scully v. Kirkpatrick* (1875), 79 Pa. 324, and is a misfortune, not a fault: *Mayrant v. Richardson*, *supra*. The tendency of all diseases, except those which impute moral turpitude, is to awaken compassion for the sufferer, and insanity is not an exception. It is true that in *Moore v. Francis*, in the Court of Appeals (1890), 121 N.

Y. 199, it was said that insanity "has usually a much more serious significance than mere physical disease;" but the Court did not attempt to define what that significance is, and the preponderance of authority is manifestly in favor of classing it with physical diseases, more serious perhaps, as affecting the most important part of the physical organization, or as smallpox is worse than scarlatina. Many diseases, as smallpox for instance, render the sufferer far more an object of aversion than mere insanity usually does. It would seem, then, from these considerations, that it is the true rule that a mere imputation of insanity, "disconnected with any special circumstances," is not within the definition or description of a libel, and is therefore not *per se* actionable, even when written or printed; that, in short, the same rule applies to a written or printed, as to an oral imputation of insanity, as far as the *prima facie* character of it is concerned: that is, to be actionable, it must be connected with other circumstances, either special damage, or the profession or business of the plaintiff, or, as in the case of a physician, be made by one whose profession lends peculiar weight to the imputation—which perhaps belongs properly to the head of special damage.

IV.

It remains, then, to consider how far an imputation of insanity is actionable as affecting the plaintiff in his profession or business; for if such an imputation cause special damage, it is, of course, actionable. The question here is, whether such an imputation is of such a nature as to affect the plaintiff in his profession or business, no matter how made, or whether it must be made of him directly in regard to that business. The general rule laid down by Townshend, § 182, is that "subject only to the conditions (1) that the occupation is one in which a person may lawfully be engaged (§ 183), and (2) that it is an occupation which does or reasonably may yield, or may be expected to yield, *pecuniary* reward, there is no employment—call it business, trade, profession or office, or what you will—so humble nor

so exalted but that language which concerns the person in such his employment will be actionable, if it affects him therein in a manner that may, as a necessary consequence, or does as a natural or proximate consequence, prevent him deriving therefrom that pecuniary reward which probably he might otherwise have obtained."

To be actionable, however, language need not be directly applicable to the plaintiff in his business; it is sufficient if it naturally result in injury to him therein: *e. g.*, words imputing a want of credit to one engaged in a business, to the successful prosecution of which credit is essential: *Townshend*, § 191; or imputing ignorance or incapacity to one engaged in a profession requiring knowledge and skill: *Id.* § 193. Does the imputation of insanity convey such an imputation of incapacity, or is it in other respects so injurious, when made in general terms, as to naturally and necessarily result in injury to one engaged in a profession or business?

It is clear at the outset that there are some professions which demand such skill and knowledge on the part of those engaged in them that an imputation of insanity is fatal to success therein. This is especially true of the learned professions, and most, if not all, scientific professions. It is true, also, of occupations where peculiar trust and confidence are reposed upon those engaged in them. It is possible, then, that *Clifford v. Cochrane* and *Moore v. Francis*, *supra*, might have been decided upon this ground, even if the imputations in those cases had not been directly of the plaintiffs in their occupations. This too, would seem to be the true ground of the ruling in *Morgan v. Lingen*, *supra*. But it is sufficient to say that this point has never, except in the last named case, directly come up for decision; and a vast class of cases lie outside of these professions, to which this discussion does not apply. There is no reported case where the imputation of insanity, cast upon a man in one of the ordinary occupations of life, has been held to so affect him in his business, as to be actionable. Nor does there seem to be

good reason why it should. The mere imputation of insanity does not expose a man to contempt and aversion among his friends, and therefore it does not follow that he will lose his established trade because of such an imputation; and the loss of speculative profits is too uncertain to sustain the action unless they be actually shown to have been caused, which reduces it to a case of special damage. Such an imputation, moreover, conveys no such necessary idea of incapacity in any particular business as will necessarily deter men from dealing with the plaintiff. By far the greater portion of insane persons are only partially so; and a great many are fully able to, and do, carry on business successfully. And wills made by such persons are valid, unless their insanity be shown to have influenced them in the disposal of their property.

It is true that such persons are not ordinarily regarded as insane. They are said to be subject to insane delusions. But it is submitted that there is no real difference between the cases, as far as capacity is concerned, and that if capacity exists in the case of a person who is said to have "insane delusions" only, it cannot be properly presumed not to exist when a person is called "insane" or crazy. Further, many diseases incapacitate a person for carrying on his business quite as much as, or even more than, insanity. An attack of fever, or a broken arm, incapacitates a mechanic most effectually from carrying on his trade. Yet it would hardly be urged that such an imputation, falsely made, would be actionable on the ground of imputing incapacity to the plaintiff. It seems, therefore, to be safer not to state the rule too broadly, but to limit the cases in which an imputation of insanity is actionable as affecting a man in his profession or business, to those cases in which the imputation directly refers, either by words or circumstances; to that profession or business, or those in which it is the natural and necessary result of such an imputation to cause injury to those engaged in particular professions or occupations, although there be no reference to such occupations.

V.

There remains the question, raised and decided in some of the cases, how far such an imputation can be considered privileged. In the first place, it was expressly ruled in *Weldon v. Winslow*, *supra*, and very clearly intimated in *Perkins v. Mitchell*, *supra*, that the imputation of insanity, regularly made in the course of a proceeding under the Lunacy Acts of a commonwealth, is privileged; and in *Mayrant v. Richardson*, although the very broad language of the Court seems to be opposed to holding such an imputation libelous in any case, the basis of the decision seems to be, that such an imputation, made *bona fide*, of a person who for the time being wears a public character, or occupies a position which makes him and his qualifications or characteristics a subject of public interest, is privileged because of that public interest. It may be argued, also, that whenever such an imputation is of a person or concerning a matter which is of general interest to the public, though not strictly public or of public concern, the privilege will attach, the person or his occupation being held to hold a *quasi*-public character. This has been decided in cases of a similar nature, such as that of an important surgical case, *Gunning v. Appleton* (1880), 58 How. Pr. (N. Y.) 471, and that of a teacher of shorthand, *Press Co. v. Stewart* (1888), 119 Pa. 584, and there would seem to be no good reason why the privilege should not extend to all cases where the plaintiff possesses a *quasi*-public character; but no decided case has ruled as yet that an imputation of insanity, otherwise actionable, would be privileged under such circumstances.

VI.

The subject may be summarized as follows: (1.) An oral imputation of insanity is not actionable, unless it cause special damage, or be of and concerning one in the way of his profession or business. Presumably, though it has not been so decided, the imputation must either be directly connected with that business, or the business be of such a nature that such an imputation will naturally and necessarily injure

the plaintiff therein. (2.) A written or printed imputation of insanity has not been decided to be libelous, except in cases where it was clearly defamatory, or affected a person in the way of his profession or business, or was made by a physician; and presumably such an imputation would not be held libelous in other cases. (3.) Even when *prima facie* libelous, the imputation of insanity may be shown to be privileged: either on account of the public character of the individual referred to, and the general interest which the public has in his qualifications, actions, or welfare; or on account of having been properly made in the course of a regular judicial proceeding, legally instituted under the Lunacy Acts of the commonwealth.

ARDEMUS STEWART.

Pollard v. Lyon (1876), 1 Otto (91 U. S.) 225; S. C. 15 AMERICAN LAW REGISTER 233, divides slander into five classes, as a summary of the commentators on the subject. The case was a charge of fornication.

Hayner v. Cowden (1875), 27 Ohio 292; S. C. 16 AMERICAN LAW REGISTER 106, declared that an accusation of drunkenness against a clergyman is actionable, as injuring him in his calling. Similarly, *Speer-ing v. Andrae* (1878), 45 Wis. 330; S. C. 18 AMERICAN LAW REGISTER 186.

The Express Printing Co. v. Copeland (1885), 64 Texas 354; S. C. 24 AMERICAN LAW REGISTER 640, restates the proposition that a candidate for a public office puts his character into issue, so far as respects for the office. The *Mayrant Case* is not cited, and the opinion proceeded generally upon the question of freedom of the press. The case arose from a publication in *The San Antonio Express*, of the statement that the defendant had retained the balance of an estate as administrator, subject to the order of the heirs, and that the heirs were afraid to give any instructions from fear of the expenses eating up the estate, with a conclusion that it was legitimate to consider his management of the affairs of others, when a person is a candidate for mayor.

The Law of Slander as applicable to physicians, is the subject of a leading article in 19 AMERICAN LAW REGISTER 465, where the writer examines the extent to which a physician can be charged with misconduct without having a cause of action therefor. The article presents the converse of the power discussed in the preceding leading article, and shows it is a safe thing for an irate parent to denounce his physician in general terms applicable to his own case alone. This is partially founded upon the English decision that to charge a physician with being a drunken fool and an ass, and no scholar, is actionable *per se* as warranting a presumption of damage.